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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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In re Applications of	)	MM Docket No. 93-94
	)	
Scripps Howard Broadcasting Company	)	File No. BRCT-910603KX
	)	
For Renewal of License of Station WMAR-TV, Baltimore, Maryland	)	
	)	
and	)	
	)	
Four Jacks Broadcasting, Inc.	)	File No. BPCT-910903KE
	)	
For Construction Permit for a New Television Facility on Channel 2 at Baltimore, Maryland	)	

To: The Honorable Richard L. Sippel
Administrative Law Judge

REQUEST TO CERTIFY APPLICATION FOR REVIEW

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Section 1.115(e)(3) of the Commission's Rules, hereby respectfully requests the Presiding Judge to certify to the full Commission an Application for Review of the Hearing Designation Order in this case, DA 93-340 (released April 1, 1993) ("HDO"). Such an Application for Review would seek

[redacted]

add these issues -- despite the Mass Media Bureau's express statement that these matters would be resolved in this proceeding -- was manifest error requiring the immediate certification of an appeal.

1. Scripps is the 100% parent corporation of Scripps Howard Cable Company of Sacramento, Inc., which is in turn the controlling owner of Sacramento Cable Television ("SCT"), the operator of a cable television system serving Sacramento, California. In July 1987, a jury of the United States District Court, Eastern District of California, found the process by which SCT had been awarded the Sacramento cable franchise to be illegal. See Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987) ("PacWest") (appended hereto as Exhibit 1). The jury's finding was based on extensive testimony that, in exchange for a 5% interest in the franchisee, SCT enlisted a "Gang of 73" locally influential citizens to buy the favor of local officials toward awarding the franchise to SCT.

2. The PacWest jury found the Sacramento franchising process to be an illegal scheme to trade a monopoly franchise in exchange for various payments. Id. at 1349-50 (Special Verdict No. 12). Specifically, the jury found that the city had employed a "sham . . . to promote the making of cash payments and provision of 'in kind' services" by Scripps subsidiary SCT, "the company ultimately selected to provide cable television service to the Sacramento market." The jury further found that this "sham" was "used . . . to obtain increased campaign contributions for local elected officials." Id. at 1350.

3. The PacWest jury findings were raised in a November 20, 1990 Petition to Deny filed by PacWest against the license renewal applications of Scripps radio stations KUPL(AM) and KUPL-FM, Portland, Oregon (File Nos. BR-901002BL, BRH-901002D8) ("KUPL Petition"). PacWest's petition went on to set forth, in considerable detail, additional evidence of "a larger tapestry of the anticompetitive strategy of the Scripps cable affiliate." KUPL Petition at 4. These allegations also were referenced by PacWest in a Petition for Reconsideration it filed in connection with Scripps' acquisition of WMAR-TV. That petition was voluntarily withdrawn and dismissed by the staff on February 22, 1991.

4. Ultimately, PacWest withdrew its petition to deny against KUPL(AM) and KUPL-FM, and in a letter to the parties dated July 27, 1992 (copy appended hereto as Exhibit B), the Chief, Video Services Division, dismissed PacWest's petition and granted the renewals of the Portland stations. That letter, however, expressly stated that

> we make no finding as to the impact of [PacWest's] allegations on Station WMAR-TV. Those allegations will be resolved in the context of the WMAR-TV proceeding. (Emphasis added).

5. Scripps did not contest the terms of the Mass Media Bureau grant of the KUPL(AM) and KUPL-FM applications, which specifically stated that the allegations raised by PacWest would be resolved in the WMAR-TV proceeding. The instant proceeding was in July 1992, and remains, the only proceeding pending involving WMAR-TV. Yet the HDO contains no mention whatsoever of the PacWest allegations concerning the anticompetitive conduct of Scripps' cable subsidiary. Given the staff's express statement

that those allegations would be resolved in this proceeding, the HDO's failure to address these matters was error. Concerns with anticompetitive activity "have occupied a unique position in the Commission's regulatory scheme." Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1201, recon. granted in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Ass'n for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. Jun. 11, 1987). Moreover, truthfulness and candor before the Commission are "key elements of character necessary to operate a broadcast station in the public interest." Id. at 1210.

6. Here, Scripps, through its Sacramento cable subsidiary, has been adjudicated to have participated in anticompetitive conduct in connection with the awarding of the Sacramento cable franchise.[1/] Scripps therefore falsely certified in its WMAR-TV renewal application, filed June 3, 1991, that no such adjudicated findings existed. The HDO thus should have designated issues to determine the impact of SCT's misconduct in Sacramento, as well as Scripps' apparent misrepresentation of facts in its renewal application, on Scripps' qualifications to be a Commission licensee.

7. Section 1.115(e)(3) of the Commission's Rules provides that an application for review of a hearing designation order shall be certified if "the matter involves a controlling question of law as to which there is substantial ground for difference of

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1/ That SCT was not a named defendant in the PacWest lawsuit is irrelevant. As shown above, the PacWest jury clearly found SCT to have engaged in influence peddling and under-the-table payments to the City of Sacramento in order to shut out cable competition.

opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation." In this case, the question of the HDO's failure to designate issues on the basis of Scripps' adjudicated anticompetitive misconduct is clearly controlling, as these facts could lead to the disqualification of Scripps as being basically unqualified. Moreover, immediate consideration of this question plainly would materially expedite the resolution of this case, as the immediate designation of appropriate issues against Scripps will facilitate prompt discovery and trial of these outstanding matters.[2/]

Conclusion

The Mass Media Bureau has expressly stated that the issues surrounding the anticompetitive conduct of Scripps' cable subsidiary would be resolved in this proceeding. The HDO nonetheless has ignored these facts entirely. So that these matters may be explored, Four Jacks urges the Presiding Judge to certify an immediate application for review of the HDO.

Respectfully submitted,

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Dated: April 8, 1993

2/ Irrespective of this request, however, Four Jacks reserves the right to seek addition of appropriate issues against Scripps during the course of this proceeding.

EXHIBIT A

Based on the foregoing DISCUSSION defendant's motion for summary judgment with respect to the individual plaintiffs and the plaintiff class is hereby DENIED.

With respect to the individual plaintiffs and the plaintiff class, this court hereby enjoins defendant from any practices, policies, customs, and usages which have herein been identified as discriminatory. To this end, the court advises that the defendant respond to this declaratory and injunctive relief in at least the following ways: [40]

—Contact community and female organizations and educational institutions for employment referrals;

—Advertise in communications media (such as newspapers, radio, and TV) which especially appeal to women;

PACIFIC WEST CABLE COMPANY, Plaintiff,

v.

CITY OF SACRAMENTO, CALIFORNIA, a municipal corporation; and County of Sacramento, California, a municipal corporation, Defendants.

Civ. No. S–83–1034 MLS.

United States District Court, E.D. California.

Aug. 13, 1987.

Cable system operator brought suit against municipal corporations, alleging that defendants' refusal to issue it a franchise violated its constitutional rights and

4. Declaratory Judgment ⇐128 10. Constitutional Law ⇐90(3)

16. Telecommunications ⇐449.10(2)

Cable television system operator was entitled to injunctive relief with respect to its request for permission to build and operate its cable television system, since operator had no adequate remedy at law and would suffer irreparable harm if equitable relief was denied.

Harold R. Farrow, Robert M. Bramson, Siegfried Hesse, Farrow, Schildhause & Wilson, Oakland, Cal., Richard Alexander, The Boccardo Law Firm, San Jose, Cal., for plaintiff.

Michael A. Small, Kathleen M. McGinnis, Preston, Thorgrimson, Ellis & Holman, Seattle, Wash., W. Young, K. Broerick, Preston, Thorgrimson, Ellis & Holman, Wash-

the additional eight verdicts and then dis charged the jury.

The court conducted one additional hear ing and received two sets of briefs (on prior to the hearing and one after) on th issue of the proper judgment, if any, to be entered on the special verdicts. The mat ter has now been submitted. The follow ing constitutes the court's judgment, in cluding its analysis and conclusions, on the jury's special verdicts and in response to plaintiff's request for injunctive relief.

I. BACKGROUND

A. *The Issue of the Franchise* [1]

In November of 1981, the Sacramento City Council and County Board of Supervi-

Further public hearings, meetings and negotiations ensued on the precise terms and conditions of the franchise to be awarded United Tribune. However, when defendants passed resolutions offering the franchise to United Tribune, it declined to accept the offer. As a result, defendants issued a second request for proposals in July of 1983.

In August 1983, plaintiff, Pacific West Cable Company, was formed as a partnership by and between Joseph Benvenuti and D. Bruce Fite. A representative of plaintiff thereafter paid for and obtained business licenses from defendants in the name

or more additional hearings, t
mission issued its final repo
thereafter, defendants offered a cable
vision franchise to Cablevision of Sacramento,[3] which offer was accepted.

On or after December 8, 1983, defendants received a letter from plaintiff concerning the issuance of an additional cable franchise. The city attorney and county counsel responded by letters dated January 25, 1984 and February 1, 1984, respectively. Plaintiff's attorney responded to those letters on February 24, 1984. The city attorney and county counsel answered by letters dated March 30, 1984 and April 6, 1984.

Angeles, 754 F.2d 1396, 1411–15 (9th Cir. 1985), *aff'd on other and narrower grounds*, 474 U.S. 979, 106 S.Ct. 380, 88 L.Ed.2d 333 (1986).

II. SPECIAL VERDICTS

At the close of evidence and final argument, the case was submitted to the jury on general instructions and eighteen special verdicts (many of which had several subparts). *See* Fed.R.Civ.P. 49(a).[4] The court used special verdicts over the objection of plaintiff, which argued that it was entitled to a general jury verdict and instructions on the law.

A. *Advantages of Special Verdicts*

There were several advantages to using special verdicts in this case. The general verdict is usually either all wrong or all right because it is an inseparable and inscrutable unit. 5A Moore's Federal Practice ¶ 49.02 (2d ed. 1986) (quoting Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253, 259 (1920)). Special verdicts, on the other hand, isolate fact findings in such a way as to allow reviewing courts to make determinations as a matter of law while preserving the jury's role as a fact finder. Brown, *Federal Special Verdicts: the Doubt Eliminator*, 44 F.R.D. 338, 346–48 (1967).

For this reason, special verdicts are a valuable tool when the law is uncertain or in a state of development; special verdicts minimize the need for, and scope of, a new trial in the event of an error of law o misapplication of law to the facts. *Id.* 342, 348; *see also* Wright and Miller, *F eral Practice and Procedure*, § 2505 494–95 (1971); Wright, *The Use of Spec Verdicts in Federal Court*, 38 F.R.D. 1 202 (1965). The Second Circuit endor the use of special verdicts in *Berkey Pho Inc. v. Eastman Kodak Co.*, 603 F.2d (2d Cir.1979), *cert. denied*, 444 U.S. 10 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980):

> We note *en passant*, however, that large and complex cases such as th involving many novel legal issues, better practice would have been to quire special verdicts or the submiss of interrogatories to the jury pursuant Fed.R.Civ.P. 49. In that way the right a jury trial of all factual issues is p served while the probability of a labo ous and expensive retrial is reduc *See SCM Corp. v. Xerox Corp.*, 4 F.Supp. 983, 988–90 & nn. 13, (D.Conn.1978), *remanded on oth grounds*, 599 F.2d 32 (2d Cir.1979). C tainly the already difficult task of viewing a case of this magnitude wo have been eased somewhat for this co if we knew precisely what the jur findings were on several specific fact issues.

Id. at 279; *see also Envirex, Inc. v. Ecol ical Recovery Associates, Inc.*, 454 F.Su 1329, 1339–40 (M.D.Pa.1978), *aff'd*, 6 F.2d 574 (3d Cir.1979) (special verdicts a preferred in complicated cases). The Nin

4. The use of special verdicts is authorized by Federal Rule of Civil Procedure 49(a), which provides:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other meth-

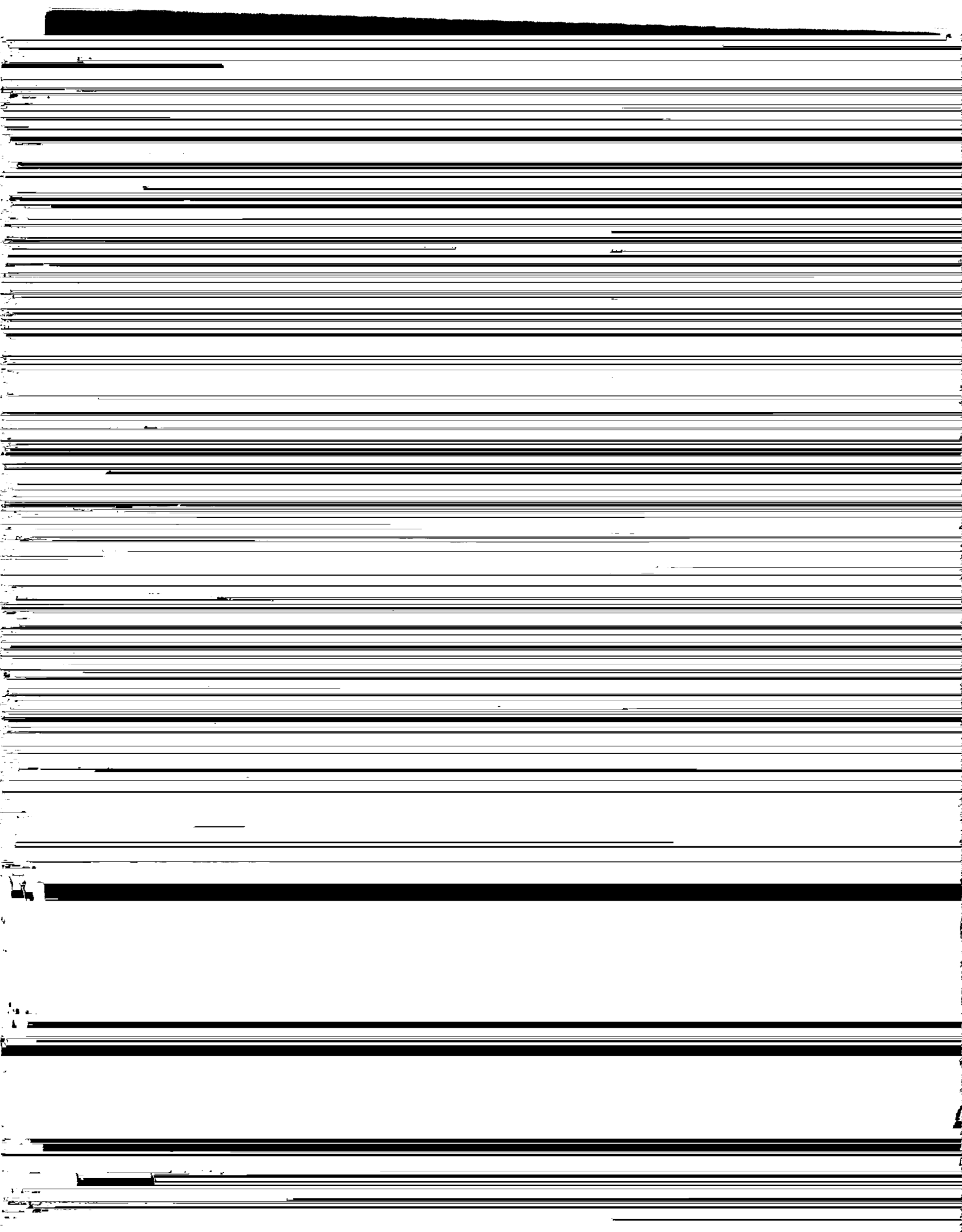
> or by the evidence, each party waives his ri to a trial by jury of the issue so omitted unl before the jury retires he demands its subm sion to the jury. As to an issue omitted wi out such demand the court may make a fi ing; or, if it fails to do so, it shall be deem to have made a finding in accord with judgment on the special verdict.

There has apparently been no question as to t constitutionality of Rule 49. *Nollenberger United Airlines, Inc.*, 216 F.Supp. 734, 737 (S Cal.1963) (citing *Walker v. New Mexico &*

Circuit has also approved the use of special verdicts as facilitating its review for harmless error. *See Pacific Greyhound Lines v. Zane*, 160 F.2d 731, 737 n. 6 (9th Cir. 1947).

The court is especially concerned about the possibility of legal errors in this case inasmuch as the Supreme Court has explicitly declined to decide the legal issues raised by cable television franchising in the absence of a fully developed factual record, *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. at 2037–38, even though it did note that where speech and conduct are joined in a single course of action, first amendment values must be "balanced" against competing societal interests. *Id.* at 2038 (citing to *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805–07, 104 S.Ct. 2118, 2128–30, 80 L.Ed.2d 772 (1984), and *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 *v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in defamation cases. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498–512, 104 S.Ct. 1949, 1958–65, 80 L.Ed.2d 502, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3561, 82 L.Ed.2d 863 (1984).

The Supreme Court and Ninth Circuit have also both held that the balancing of interests which occurs in cases in which an employee is discharged for allegedly exercising first amendment free speech rights is one of law. *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 150 n. 10, 103 S.Ct. 1684, 1690 n. 7, 1692 n. 10, 75 L.Ed.2d 708 (1983); *Loya v. Desert Sands Unified School District*, 721 F.2d 279, 281 (9th Cir.1983). In fact, the Ninth Circuit has held that it is error for a trial court to leave the balancing to the jury. *Loya*, 721 F.2d at 281–82; *see also Keller v. City of Reno*, 587 F.Supp. 21, 23 n. 4 (D.Nev.1984). This



defendants did not use such interest as pretexts to justify the franchising process.

Finally the jury said that defendants' franchising process does *not* result in "better" cable television service (in terms of the system's technology, capabilities and channel capacity) than would be achieved without the franchising process. The jury was unable to agree on whether defendants used "better cable television service" as a pretext to justify their franchising process.

The jury was also unable to agree on whether the predominant purpose of defendants' franchising process was to suppress speech. They disagreed on whether the predominant purpose was to limit the ability of cable operators to express their views and exercise their editorial judgment. The jury was also divided on whether defendants denied plaintiff permission to construct and operate a cable television system because defendants oppose plaintiff's views. Also unanswered are the special verdicts on whether the franchising process applies evenhandedly, regardless of viewpoint, and whether defendants' purpose was to advance the expression of one viewpoint and discourage the expression of another.

C. *The Court's Task*

[1] Once the special verdicts are recorded, the court then applies the law to the facts and enters judgment as provided in 769 F.2d 195, 198 (4th Cir.1985) (court has duty to harmonize answers if fairly possible). Finally, a special verdict must, of course, be construed in light of surrounding circumstances. *R.H. Baker*, 331 F.2d at 509.

III. FINDINGS AND CONCLUSIONS BY THE COURT

A. *Mootness as a Result of Change in Cable Policy*

The threshold question the court must address concerns an issue which arose after the jury returned its special verdicts. Defendants enacted ordinances which opened up the cable market to competition. These ordinances impose certain requirements [5] on would-be cable operators but otherwise abandon the single franchise policy. Defendants observe that plaintiff is only challenging defendants' determination that there should be a single provider of cable television services in Sacramento. Because this is no longer defendants' policy, defendants argue that plaintiff's request for injunctive and declaratory relief is moot.

[2, 3] A case, or a question in a case, is considered moot if it has lost its character as a present, live controversy. *Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1189 (9th Cir.1986). The basic question is whether there is a sufficient prospect that

issues in a case, no justiciable controversy is presented. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968)).

In *Armster v. United States District Court*, 806 F.2d 1347 (9th Cir.1986), the Ninth Circuit indicated that the ultimate question is the likelihood of recurrence of the challenged activity. *Id.* at 1358. When there is a reasonable possibility that the unlawful conduct will recur, the mere cessation of that conduct will not render the challenged conduct immune from judicial scrutiny. *Id.* at 1358–59. There is a "powerful presumption favoring adjudication" under such circumstances. *Id.* at 1359 (quoting Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L.Rev. 1, 27 (1984)).

The court does not question defendants' good faith in adopting these new ordinances. However, the new ordinances are presently under attack; the existing franchisee recently filed suit in state court against, *inter alia*, the defendants in this suit. The state court suit alleges that the new ordinances are unconstitutionally vague and violate the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.* The complaint also alleges that the new ordinances conflict with provisions of the old cable television ordinance (which was not repealed) and various contractual

defendants from issuing any licenses under the new ordinances.

[4] This court cannot, at this early stage, express any views on the merits of these attacks on the new ordinances. The attacks nonetheless create the possibility that any licenses issued under the ordinances will ultimately be invalidated. If this occurs, plaintiff in the instant case will not receive the relief it sought in initiating this lawsuit: the right to enter the Sacramento cable television market.

In short, this court can only resolve one lawsuit at a time. The law on cable television franchising/licensing is too uncertain for this court to even begin to predict the outcome of this second suit. Consequently, it must *assume* that the second lawsuit creates a reasonable possibility that permanent licenses will not be issued under the new ordinances or, if they are, they may be subsequently declared invalid. Because of this, the court's decision vis-a-vis injunctive relief in the instant case will have an impact on the parties and will affect plaintiff's rights. Therefore, plaintiff's request for injunctive and declaratory relief is not moot.[7]

B. *Plaintiff's First Amendment Rights*

Plaintiff claims, in essence, that defendants' refusal to give plaintiff permission to

may not be imposed on one engaging in the cable television business.

1. Plaintiff's Speech is Protected by the First Amendment

[5] As a threshold matter, the court notes that both the Supreme Court and Ninth Circuit have determined that cable television system operators are entitled to some degree of first amendment protection. *Preferred*, 754 F.2d at 1403 (it is clear "some" first amendment protection exists), *aff'd on narrower grounds*, 106 S.Ct. at 2037 (proposed activities "seem to implicate" first amendment interests); *see also Pacific West*, 798 F.2d at 355 ("Pacific West's proposed cable broadcasting activities undoubtedly implicate first amendment interests ...").

The jury found in this case that plaintiff has the technical and financial capabilities to construct and operate a cable television system, and hence is a first amendment speaker. As such, plaintiff's exclusion from the cable television market creates a first amendment issue.

2. Standard to be Applied

Of course, to say that defendants' franchising process presents a first amendment *issue* is not to say that it constitutes a first amendment *violation*. *See Vincent*, 466 U.S. at 803–05, 104 S.Ct. at 2127–28 (quoting *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 561, 101 S.Ct. 2882, 2920, 69 L.Ed.2d 800 (1981) (Burger, C.J., dissenting)). The mere fact that a regulation imposes a limitation on constitutionally protected speech does not mean the regulation is invalid; the question is whether the regulation represents a constitutionally permissible restriction on speech. *See Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

[6, 7] Defendants argue that this determination cannot be made at this point because the jury was unable to agree on any of the special verdicts dealing with "content-neutrality" of defendants' policy. Regulations adopted with a purpose to suppress first amendment rights are presumptively invalid; however, this presumption only applies if suppression of speech is a predominant purpose in enacting the regulation. *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334–35 (9th Cir. 1986) (citing *City of Renton v. Playtime Theatres*, 475 U.S. 41, 45–49, 106 S.Ct. 925, 928–29, 89 L.Ed.2d 29, *reh'g denied*, 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986)). "Content-based" suppression of speech is impermissible because government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. *Renton*, 106 S.Ct. at 929 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95–96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972)).

Defendants contend that the jury's inability to agree on defendants' purposes in using their franchising process means that the only appropriate course of action at this point is to schedule further trial limited to the issue of contentneutrality, citing *Iacurci v. Lummus Co.*, 387 U.S. 86, 87, 87 S.Ct. 1423, 1424, 18 L.Ed.2d 581 (1967) (per curiam), and 5A Moore's Federal Practice ¶ 49.03[4] at 49–29. These authorities stand for the proposition that a jury's failure to determine an issue actually submitted to it requires a new trial on the issue, because the right to a jury trial thereon has not been waived.

[8] The court agrees that it would be improper for the court to make an affirmative finding on whether defendants' policy does indeed discriminate against speech and speakers based on viewpoint.[9] However, a new trial is only necessary if the jury's determination on that issue would make a difference to the court's judgment. *See Union Pacific Railroad Co. v. Bridal Veil Lumber Co.*, 219 F.2d 825, 831–32 (9th

9. The court notes that plaintiff does indeed ask for such a finding in its post-trial brief and asks this court to subject defendants' policy to strict scrutiny. *See Consolidated Edison*, 447 U.S. at 540, 100 S.Ct. at 2334 (regulation must be a precisely drawn means of serving a compelling governmental interest).

Cir.1955) (jury's disagreement on "vital question" left "a gaping hole" in special verdict requiring a new trial), *cert. denied*, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 849 (1956). Even if the jury found in defendants' favor during the new trial, the court would find that defendants' policy does not survive the lesser scrutiny applied to viewpoint-neutral regulations. Because of this, no new trial is necessary.

Accordingly, the court will assume, for the purposes of analysis, that defendants' policy is viewpoint-neutral.[10] The appropriate framework for reviewing a viewpoint-neutral regulation is set forth in *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. Under *O'Brien*,

> [a] government regulation is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377, 88 S.Ct. at 1679; *see also Preferred*, 754 F.2d at 1405–06; 106 S.Ct. at 2037–38 (also referring to *O'Brien* test).

A regulation is "no greater than essential" under *O'Brien* if it promotes a substantial government interest which would be achieved less effectively absent the regulation. *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2907, 86 L.Ed. 2d 536 (1985). Regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech, *id.;* some "substantially relevant correlation" between the interests asserted and the single franchise policy must exist. *See Pacific Gas and Electric v. Public Utilities Commission of California*, 475 U.S. 1, 19, 106 S.Ct. 903, 913, 89 L.Ed.2d 1 (discussing the definition of a "narrowly tailored" means), *reh'g denied*, 475 U.S. 1133, 106 S.Ct. 1667, 90 L.Ed.2d 208 (1986); *see also Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 298 n. 8, 104 S.Ct. 3065, 3071–72 n. 8, 82 L.Ed.2d 221 (1984) (*O'Brien* requires an "adequate nexus between regulation and interest sought to be served"); *Preferred*, 754 F.2d at 1406 (requiring a "more sharply focused response").

[9, 10] The court notes in passing that defendants' policy cannot be justified as a content-neutral "time, place and manner" regulation. Time, place and manner restrictions are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. *City of Renton*, 106 S.Ct. at 928 (citing *Clark*, 468 U.S. at 293, 104 S.Ct. at 3069, *Vincent*, 466 U.S. at 807, 104 S.Ct. at 2130, and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981)). In this case, the jury found that defendants had not left open ample alternative channels of communication for plaintiff, and persons like plaintiff, who wish to express their views. *See also Preferred*, 754 F.2d at 1410 (public access channels not an adequate substitute for right to operate a cable system). Defendants' single franchise policy results in plaintiff's cable television speech being restricted, in essence, to "no time, no place and no manner." *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75–77, 101 S.Ct. 2176, 2186–87, 68 L.Ed.2d 671 (1981).[11]

10. The district court in *Century Federal, Inc. v. City of Palo Alto, California*, 648 F.Supp. 1465 (N.D.Cal.1986), also assumed, for the purposes of a summary judgment motion, that the franchising process was content-neutral. *Id.* at 1475 n. 16. It therefore applied the *O'Brien* test. *Id.* at 1475; *but see Preferred*, 754 F.2d at 1406 (single franchise policy creates a serious risk that public officials will discriminate on the basis of the content of, and views expressed in, the company's programs).

11. An example of a reasonable time, place and manner regulation of cable television might involve restricting the intervals at which cable television systems are installed, e.g., allowing access to utility underground conduits every few years. This might constitute the "sharply focused response," *see Preferred*, 754 F.2d at 1406, to defendants' asserted interest in controlling the number of times its citizens must bear the inconvenience of having their streets and yards dug up. *See Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377 (10th

3. Analysis

a. Constitutional Power of Government to Regulate Cable Television

[11] The authority of local government to authorize the construction and operation of cable systems within its jurisdiction is recognized under both state and federal law. Section 53066 of the California Government Code provides, in pertinent part:

> Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid.... Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever.

The court disagrees with plaintiff's contention that section 767.5 of the California Public Utilities Code supersedes this provision in the Government Code and somehow "preempts" local regulation of cable television. Section 767.5(b) provides:

> The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.
>
> The Legislature further finds and declares that it is in the interest of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

The court interprets this section as imposing upon public utilities a mandatory duty to make "surplus space" on utility poles and in utility easements available for use by cable television operators. The section in no way addresses or diminishes the authority of local governments to regulate access to that space.

The Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, and the legislative history accompanying it, also recognizes the authority of local governments to authorize construction of cable systems over public rights of way and utility easements. *See* 47 U.S.C. § 541(a) (a franchising authority may award one or more franchises; franchises authorize construction of cable systems over public rights of way and utility easements). Although the 1984 Act was not in effect at the time defendants enacted the cable television ordinance, the franchising provisions of the Act were declarative of existing law and practice.

Cir.1981), *cert. dismissed*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127–28 (7th Cir.1982); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F.Supp. 976, 984 (D.R.I.1983), *vacated as moot*, 773 F.2d 382 (1st Cir.1985). The court notes, however, that the jury rejected all of the justifications for defendants' policy based on the disruptiveness of installing cable television systems.

See H.R.Rep. No. 934, 98th Cong. 2d Sess., 1984, 19, *reprinted in* 1984 U.S.Code Cong. & Ad.News 4655, 4656 (the act "continues reliance on the local franchising process as the primary means of cable television regulation . . ."); S.Rep. No. 67, 98th Cong., 1st Sess., 11 ("the bill restores the jurisdictional framework for cable to its traditional and appropriate balance. That balance continues to give local governments the authority over areas of local concern and authorizes them to protect local needs.")

[12] Consequently, franchising of cable television systems is within defendants' constitutional power. *Accord, Century Federal,* 648 F.Supp. at 1475 n. 17; *see also Preferred,* 754 F.2d at 1400 (cable franchising is authorized by Cal.Gov't.Code § 53066; 1984 Cable Act envisions similar practice).

b. Magnitude of Interests Which Must Be Served

start with a competitive free-for-all—different cable television systems frantically building out their grids and signing up subscribers in an effort to bring down their average costs faster than their rivals—but eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. In the interim there may be wasteful duplication of facilities. This duplication may lead not only to higher prices to cable television subscribers, at least in the short run, but also to higher costs to other users of the public ways, who must compete with the cable television companies for access to them.

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d at 126. The Eighth Circuit described the phenomenon this way:

> [a] monopoly resulting from economics of scale, a relationship between the

able service at reasonable rates ... [This] may be the inevitable destination to which all routes converge.

694 F.2d at 126; [12] *see also Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 234 (5th Cir.) ("If there is to be no competition within a given territory, competition is only possible before the franchise is granted."), *vacated on other grounds*, 714 F.2d 25 (1983), *and adhered to*, 735 F.2d 1555 (5th Cir.1984) (en banc).

If the jury had determined that cable television in the Sacramento area was indeed a natural monopoly and that competition would have "inevitably" resulted in a single firm controlling the market, then the impact of a single franchise policy on first amendment freedoms would have been much less.[13] If, because of the cost structure of a cable television system, a monopoly is inevitable, it does not significantly reduce the overall diversity of expression if government accelerates the process by designating the monopolist at the outset, particularly if the cable operator agrees to provide public access channels and facilities and provided that the selection criteria are content-neutral. *But see Preferred*, 754 F.2d at 1406 (single franchise policy creates serious risk of content discrimination).

[13] However, if competition is feasible and sustainable, then the impact of selecting a single cable television service provider and then excluding all others has an extremely significant effect on expression. As a result, the magnitude of the government interests necessary to justify such an impact on expression must be very substantial. Unfortunately the interests identified by the jury are not sufficiently substantial to justify a government-endorsed monopoly over a particular medium of communication, nor is such a monopoly "essential" to the furtherance of these interests.

12. Any claims that defendants' single franchise policy resulted in a "more efficient" cable system than under a competitive system is belied by the jury's finding that defendants' policy did *not* result in "better" cable television service (in terms of the system's technology, capabilities and channel capacity) than would have been achieved without defendants' actions.

c. Government's Interest in Financial and Technical Qualifications of Cable Operators

The government's interest in the technical and financial qualifications of cable television system operators is reflected in various sections of the 1984 Cable Act. *See* 47 U.S.C. § 544 (regulation of services, facilities and equipment), § 552 (consumer protection); it is also reflected in the Act's legislative history:

> This grant of authority to a franchising authority to award a franchise establishes the basis for state and local regulation of cable systems. Other sections of the bill establish certain terms by which such authority may be exercised. In addition, matters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to the grant of a franchise (*e.g.*, duration of the franchise term, delineation of the service area), the construction and operation of the system (*e.g.*, extension of service, safety standards, timetable for construction) and the enforcement and administration of a franchise (*e.g.*, reporting requirements, bonds, letters of credit, insurance and indemnification, condemnation, and transfers of ownership).

H.R.Rep. No. 934, 98th Cong. 2d Sess. 59, *reprinted in*, 1984 U.S.Code Cong. & Admin.News 4655, 4696. The Ninth Circuit has also suggested that local government has a legitimate interest in the "size, shape, quality, [and] qualifications" of cable television operators. *Pacific West*, 798 F.2d at 355.

In this case, however, even though the jury found that the public has a significant interest in the technical and financial quali-

13. The court emphasizes that it is not expressing an opinion as to whether a single franchise policy would be permissible if the jury *had* found that cable television is a natural monopoly. *See Century Federal*, 648 F.Supp. at 1474–77 (rejecting "natural monopoly" as a justification for a single franchising scheme). All this court is saying is that the *impact* of such a policy on first amendment interests is much greater when cable television is not a natural monopoly.

fications of cable television system operators, it also found that defendants' policy did not promote their interest in having a technically well-qualified cable television system operator. Furthermore, the jury also found that plaintiff has the technical and financial capabilities to construct and operate a cable television system, which suggests that defendants' single franchise policy goes further than necessary in excluding would-be cable television system operators from the market. In fact, there was no showing or argument that a single franchise policy is the only, or even the most effective, way to assure that only technically and financially sound cable television systems are built.[14] Thus while these constitute significant government interests, the restriction on speech caused by defendants' policy is significantly greater than necessary to promote these interests.

d. Government's Interest in Uniform Cable Service

The substantiality of the government's interest in assuring uniform cable television service is also reflected in the fact that the 1984 Cable Act mandates such service. Section 621(a)(3) of the Act provides:

> In awarding a franchise or franchises, a franchising authority shall assure that access to cable services is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

47 U.S.C. § 541(a)(3). In adopting this provision, Congress explained:

> Subsection (a)(3) provides that in awarding the franchise, the financing authority shall assure that no class of potential residential cable subscribers is denied cable service due to income or economic status. In other words, cable systems will not be permitted to "redline" (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice. However, this would not prohibit a franchising authority from issuing different franchises for different geographic areas within its jurisdiction.

House Report, at 59, 1984 U.S.Code Cong. & Admin.News at 4696.

However, Congress' intentions vis-a-vis uniform service has been the subject of controversy. Initially, the Federal Communications Commission ("F.C.C.") interpreted this section as meaning that "the franchising authority shall require that *all* areas of the franchised area be wired." Notice of Proposed Rulemaking, 49 Fed.Reg. at 48,769 (emphasis added). It subsequently retreated from this position:

> [T]he intent of [section 621(a)(3)] was to prevent the exclusion of cable service based on income and that this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area.

Report and Order, 50 Fed.Reg. at 18,647. The District of Columbia Circuit recently upheld F.C.C.'s most recent interpretation, reasoning that

> [t]he statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service. The agency ruling explicitly reaffirms the prohibition against redlining emphasized by the House report. The ACLU argues that the committee report evidences congressional intent that as a practical matter one can only deal with redlining by wiring "all areas of the franchise." Otherwise "an endless variety of 'facially neutral' excuses [could] be used

14. The court notes that defendants' new licensing ordinances set minimum technical and financial standards for cable television operators. Sacramento County, Cal., Code ch. 5.75 (hereinchapter 7 (Bonds and Insurance) (July 6, 1987); Sacramento City, Cal., Code ch. 20.5 (hereinafter cited as "City Ordinance"), sub-chapter 3 (System Capability and Standards), sub-chapter

by cable operators to deny cable service to 'unprofitable' parts of a community." Brief for ACLU at 25. We hold that this one sentence from the committee report cannot reasonably be read to so drastically limit the agency's interpretation of the scope of its discretion in accomplishing the legislative goal. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 598 [101 S.Ct. 1266, 1276, 67 L.Ed.2d 521] (1981) ("The legislative history of the Act ... provides insufficient basis for invalidating the agency's construction of the Act."); *cf. supra* II.A.1 at 36–39. Rather, we read the sentence to require exactly what it says: "wiring of all areas of the franchise" *to prevent redlining.* However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited. This is precisely the statement made in the interpretative ruling. It wholly conforms to the statute and the explication in the House report. We therefore uphold the comment as fully consistent with clear congressional intent.

ACLU v. F.C.C., 823 F.2d 1554 (D.C.Cir. 1987).

Of course, defendants are free to go further than Congress requires, and again, defendants adopted the policy challenged in this suit prior to the effective date of the 1984 Cable Act. In fact, of all of the interests identified by the jury, the court believes that defendants' interests in assuring uniform service and preventing redlining is the most substantial, inasmuch as it promotes the "widest possible dissemination of information." *See Associated Press*, 326 U.S. at 20, 65 S.Ct. at 1425.[15] Yet as important as the government's interest is in equal and uniform service, it is not sufficiently substantial to justify a government-created, artificial monopoly over a particular medium of communication, particularly when it is not clear that such a monopoly is essential to achieving such uniform service.

e. Government's Interest in Public Access Channels, Etc.

Public access to cablecasting is another interest which Congress saw fit to cover in the 1984 Cable Act, although the Act's provisions are permissive only. 47 U.S.C. § 531.[16] Of all the interests identified by

15. The court acknowledges, however, that such a requirement may be challenged as representing "forced speech." *See Pacific Gas and Electric*, 106 S.Ct. at 909 (first amendment protections include right not to speak).

16. The Act's access provisions read:

Section 531. Cable channels for public, educational, or governmental use.

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

(c) Enforcement authority

A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b) of this section.

(d) Promulgation of rules and procedures

In the case of any franchise under which channel capacity is designated under subsection (b) of this section, the franchising authority shall prescribe—

(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

(2) rules and procedures under which such permitted use shall cease.

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section....

the jury, public access is the most controversial.

For example, public access requirements may have their own constitutional infirmities. The Supreme Court has explicitly refused to rule on the first amendment permissibility of public access requirements, except to note that the claims of unconstitutionality are not frivolous. *See Midwest Video Corp. v. F.C.C.*, 440 U.S. 689, 709 n. 19, 99 S.Ct. 1435, 1446 n. 19, 59 L.Ed.2d 692 (1979). Congress was careful to note this when it included a public, educational and governmental (PEG) access provision in the 1984 Cable Act:

> H.R. 4103 includes several provisions, specifically those related to PEG and commercial access, which may require that certain channels or portions of channels on a cable system be available for programming and controlled by a person other than the cable operator. The committee is aware that access provisions have been challenged in the court as inconsistent with the First Amendment rights of the cable operator. The Committee believes, nonetheless that the access provisions contained in this legislation are consistent with and further the goals of the First Amendment. The provision [sic] establish a form of content-neutral structural regulation which will foster the availability of a "diversity of viewpoints" to the listening audience. In the past, courts have held a similar regulation to be consistent with the First Amendment.

H.R.Rep. No. 98–934, 98th Cong.2d Sess. at 31, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4655, 4668. Two district courts have held that access requirements are constitutional. *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580, 598–601 (W.D.Pa.1987); *Berkshire Cablevision*, 571 F.Supp. at 987; *but see Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, 1053–57 (8th Cir.1978), *aff'd on other grounds*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). In each of the cases in which the access requirement was found constitutional, the court nonetheless acknowledged that access infringed upon the rights of the franchisee. *Erie*, 659 F.2d at 599; *Berkshire*, 571 F.Supp. at 987.

Moreover, some of the jury's verdicts in this case indicate that defendants' interests were not "unrelated to the suppression of expression," as required under the *O'Brien* test. The jury found that defendants were motivated to secure public access channels and in kind services by a desire to obtain political support and favor political supporters. The jury also found that defendants used cable television's allegedly naturally monopolistic nature as a pretext to obtain cash payments, in kind services and increased campaign contributions. This suggests that defendants sought to enhance the speech of some while burdening the expression of others—a result which is contrary to the first amendment values. *See Pacific Gas and Electric*, 106 S.Ct. at 914 (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86, 98 S.Ct. 1407, 1420–21, 55 L.Ed.2d 707, *reh'g denied*, 438 U.S. 907, 98 S.Ct. 3126, 57 L.Ed.2d 1150 (1978), and *Buckley v. Valeo*, 424 U.S. 1, 48–49, 96 S.Ct. 612, 648–49, 46 L.Ed.2d 659 (1976)).

While these motivations do not rise to the level of a "predominant purpose" to suppress speech, *see Walnut Properties*, 808 F.2d at 1334–35, they nonetheless affect the analysis of whether the defendants' interest in providing public access is sufficiently substantial to justify the impact on expression caused by a single franchise policy. As with the potential constitutional questions surrounding public access, the fact that defendants may have had less than noble motivations in promoting public access diminishes the substantiality of the government's interest in such access and increases the resulting impact on expression.

Finally, even if public access requirements are constitutional, the court is again not persuaded that a single franchise policy is the only effective way to secure such access. The court recognizes that the prospect of a monopoly is more likely to motivate a cable television system operator to accept public access requirements. *See Century Federal*, 648 F.Supp. at 1476 (of-

fer of exclusive franchise can be used as a "plum" to bargain for certain concessions, *e.g.*, access channels, which may not be obtainable under a competitive system).

ing defendants from interfering with the rights established in favor of plaintiff under the requested declaratory relief judgment; (3) special and general damages oc-

Irrespective of whether plaintiff did or did not present its claims in this respect to the jury, injunctive relief is not appropriate.

[16] However, the court finds that injunctive relief is appropriate with respect to plaintiff's request for permission to

JUDGMENT

Pursuant to the special verdicts of the jury and the determinations and conclusions of law signed and filed by the court on August ____, 1987 (entitled "Memorandum Decision, Conclusions of Law and Order for Judgment") and